



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 3, 1996

Mr. John A. Riley
Assistant Director
Litigation Support Division
TNRCC
P.O. Box 13087
Austin, Texas 78711-3087

OR96-1577

Dear Mr. Riley:

You have asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 100378.

The Texas Natural Resource Conservation Commission (the "TNRCC") received requests for information concerning Encycle, Inc., formerly Asarco, Inc. You assert that the information at issue is excepted from disclosure pursuant to sections 552.103(a), 552.107, 552.110, and 552.111 of the Government Code.¹

To show that section 552.103(a) is applicable, a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to the litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The governmental entity must meet both prongs of this test for information to be excepted under

¹You assert that some of the information at issue is confidential pursuant to section 552.101 because it is related to the attorney-client privilege. Please note that section 552.107 is the appropriate section to cite when seeking to withhold from disclosure communications between the governmental body and its legal counsel. See Open Records Decision No. 574 (1990). You apparently also argue that section 552.352 requires a governmental body to maintain as confidential records relating to the attorney-client privilege. We note, however, that section 552.107 may be waived by the governmental body. See Open Records Decision No. 630 (1994).

section 552.103(a). You state that "certain information is protected from public disclosure under section 552.103(a)." However, you have not provided information sufficient to meet your burden under section 552.103(a). The documents at issue thus may not be withheld from disclosure under section 552.103(a).

You marked some documents as being excepted from disclosure pursuant to section 552.107(1). We note that documents are not protected under section 552.107(1) simply because copies were sent to the governmental body's legal counsel. Nor does section 552.107(1) provide a blanket exception for all communications between clients and attorneys or all documents created by an attorney. It excepts only those communications that reveal client confidences or the attorney's legal opinion or advice. Open Records Decision Nos. 589 (1991) at 1; 574 (1990) at 3; 462 (1987) at 9-11. Section 552.107(1) does not except from disclosure a "basically factual recounting of events." Open Records Decision No. 574 (1990) at 5. We have marked a sample document to show the type of information that is excepted from disclosure pursuant to section 552.107(1).

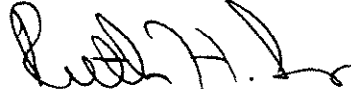
Section 552.111 excepts from disclosure inter-agency or intra-agency communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body. *See Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ); Open Records Decision No. 615 (1993) at 5. Section 552.111 excepts from required public disclosure preliminary drafts of documents related to policymaking matters, since drafts represent the advice, opinion, and recommendation of the drafter as to the form and content of the final documents. *See* Open Records Decision No. 559 (1990). However, section 552.111 does not except from disclosure purely factual information. We have marked sample documents to show the type of information that may be withheld from disclosure pursuant to section 552.111.

You also asserted that some of the documents may be protected from disclosure pursuant to section 552.110. Section 552.110 provides an exception for "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." As provided by section 552.305 of the Open Records Act, this office provided Encycle Inc. the opportunity to submit reasons as to why any of the information at issue should be withheld pursuant to section 552.110. However, Encycle Inc. did not submit any arguments to this office concerning section 552.110. We also note that you did not indicate which documents might be protected under section 552.110. Thus, section 552.110 has not been shown to be applicable. *See* Open Records Decision No. 363 (1983) (third party has duty to establish how and why exception protects particular information).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous

determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/ch

Ref.: ID# 100378

Enclosures: Submitted documents

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